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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NATIONAL ASSOCIATION OF WHEAT GROWERS ET AL.,

Plaintiffs,

v.

LAUREN ZEISE, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF ENVIRONMENTAL HEALTH HAZARD ASSESSMENT; AND XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Defendants.

Civil Action No. 2:17-CV-02401-WBS-EFB

DEFENDANTS' OPPOSITION TO AMICUS CURIAE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CALIFORNIA CHAMBER OF COMMERCE

Date:	February 20, 2018
Time:	1:30 p.m.
Courtroom:	5
Judge:	The Honorable William B. Shubb
Trial Date:	None set.
Action Filed:	November 15, 2017

INTRODUCTION

The Amicus Curiae Brief ("Chambers' Brief") filed by the Chamber of Commerce of the United States and the California Chamber of Commerce (jointly, "Chambers") echoes the same misstatements of law and fact contained in Plaintiffs' preliminary injunction motion. To the extent the Chambers' Brief raises additional legal arguments, those arguments mischaracterize both Proposition 65 and any burden it places on businesses. More specifically, and as detailed below, the Chambers' Brief relies on a number of arguments that are based on false premises and simply wrong.

I. PROPOSITION 65 WARNINGS DO NOT NEED TO CONTAIN THE PHRASE "KNOWN TO THE STATE TO CAUSE CANCER," AND, IF REQUIRED, THEY CAN BE TAILORED TO FIT THE FACTS APPLICABLE TO GLYPHOSATE.

The linchpin of the Chambers' argument is their assertion that they will be required to provide warnings that say glyphosate is a chemical "known to the State to cause cancer," a claim they insist is false and will violate their First Amendment rights. Chambers' Brief at 2, 8-11. The premise of the argument is wrong. Nothing in Proposition 65 requires a business to use the "known to the State to cause cancer" warning language. The "known to the State of California to cause cancer" language is part of the regulatory "safe harbor" warning, Cal. Code Regs. tit. 27 ("27CCR"), § 25601, deemed to satisfy the "clear and reasonable" warning requirement of the statute. However, as discussed in Defendants' Opposition to Motion for Preliminary Injunction ("Opposition"), a "safe harbor" warning, by definition, is not mandatory; and businesses are free to craft alternative warning language that does not use the safe harbor terminology, as long as the warning is "clear and reasonable." Cal. Health & Safety Code § 25249.6; *see also* Opposition at 7; Office of Environmental Health Hazard Assessment, *Final Statement of Reasons, Title 27, California Code of Regulations, Proposed Repeal of Article 6 and Adoption of New Article 6 Regulations for Clear and Reasonable Warning*, available at https://oehha.ca.gov/media/downloads/crnr/art6fsor090116.pdf (last visited January 25, 2018), at 8, 14 ("Alternatively, a business may use any other warning method or content that is clear and reasonable under the Act;" "However, both the current and newly proposed regulations expressly

allow businesses to provide alternative warnings other than the safe harbor warnings."). In fact, the new safe harbor regulations allow the following option: "**WARNING:** Cancer - www.P65Warnings.ca.gov," 27CCR, §25603(b)(2)(A), and the Attorney General has made clear his position that a warning need not contain the safe harbor language. *See, e.g.*, Declaration of Susan S. Fiering in Support of Opposition to Chambers' Brief, ¶¶ 4-5 and Exhibits A and B (warning proposed by Attorney General in *People v. Tri-Union Seafoods, LLC et al.*, Superior Court, County of San Francisco, Consolidated Case Nos. CGC-01-402975; CGC-04-432394, involving mercury in canned tuna).[1]

Further, the Attorney General has similarly agreed to, and the courts have approved, warnings that contain significantly more information than the safe harbor language when the added language is necessary to provide consumers with accurate information sufficient to support an informed choice. By way of example, the court-approved warning for acrylamide in food products includes the following information: "Your personal cancer risk is affected by a wide variety of factors. The FDA has not advised people to stop eating baked or fried potatoes. For more information see www.fda.gov." Opposition at 8 (citing Zuckerman Decl., Exh. C, Consent Judgment Between Plaintiffs People of the State of California, Council for Education and Research on Toxics, and Defendant Burger King Corporation in *Council for Education and Research on Toxics v. McDonald's Corporation and Burger King Corporation*, No. BC280980 (Cal. Super. Ct. 2007), at 4).[2]

[1] The court in *Tri-Union* ruled that no warnings were required in that case, so did not review the adequacy of the warning language. *See People ex rel. Brown v. Tri-Union Seafoods, LLC*, 171 Cal. App. 4th 1549, 1576 (Cal. Ct. App. 2009).

[2] Even Plaintiffs have proposed a warning they imply would be "clear and reasonable" under Proposition 65: "California is aware of one report suggesting that glyphosate caused cancer in certain experimental animals. But many other reports disagree, including those conducted by U.S. and international regulators." Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction at 36. While Defendants do not agree that the warning, in its current form, is clear and reasonable, it could be edited to remove its inaccurate and misleading connotations, and to reasonably state the facts. (For example, IARC's Monograph did not "suggest" that glyphosate caused cancer in "certain" animals – it concluded based on published studies that there is sufficient evidence in experimental animals for the carcinogenicity of glyphosate, Declaration of Laura J. Zuckerman in Support of Defendants' Opposition to Motion for Preliminary Injunction ["Zuckerman Decl."], Exh. O, IARC *Glyphosate*, from Monograph 112, at 78-79.) Ultimately, the issue is one that must be decided by a subsequent court faced with actual proposed warnings and based on a complete factual record.

The central premise of the Chambers' Brief – that their members will have to give a warning that is false because it contains the terms "known to the State to cause cancer," and nothing more – is therefore simply wrong.

II. THE CHAMBERS' MEMBERS WILL NOT NEED TO PROVIDE WARNINGS IF THEIR PRODUCTS CONTAIN ONLY "NEGLIGIBLE" AMOUNTS OF GLYPHOSATE.

The Chambers next claim that their members must provide Proposition 65 warnings for any food products, textiles and feminine hygiene products that contain "trace" amounts of glyphosate, or that cause "negligible, even microscopic exposures," and that they will need to "throw in the towel by removing all glyphosate from their products" or face "economic hardship." Chambers' Brief at 2, 4, 14, 18. The facts are different.

As discussed in detail at pages 5 and 33-34 of the Opposition, a business is exempt from the warning requirement if it can show that the exposure it causes to the average consumer does not cause a significant risk of cancer – i.e., causes no more than *one excess cancer per 100,000 exposed individuals,* a standard significantly less strict than that applied by many regulatory agencies. § 25249.10(c); 27CCR § 25703(b); *Ingredient Communic'n Council v. Lungren*, 2 Cal. App. 4th 1480, 1494, n.8 (Cal. Ct. App. 1992). OEHHA has proposed a regulatory safe harbor no significant risk level ("NSRL"), which, if adopted, will exempt products that cause an exposure of no more than 1,100 micrograms per day. As shown at pages 22-23 of the Opposition, products that expose people to "negligible" amounts of glyphosate will therefore not require a warning.

III. PROPOSITION 65 DOES NOT "INVERT" THE FIRST AMENDMENT'S FREE-SPEECH PRESUMPTION.

In their only novel argument, the Chambers claim that, because Proposition 65 has provided an exemption from the warning requirement based on the NSRL, it thereby "inverts the First Amendment's Free Speech Presumption" by requiring businesses to justify why they should be allowed to remain silent. Chambers' Brief at 13-14. This argument is flawed for two reasons.

First, the Chambers' argument would be well-taken if Proposition 65 required businesses automatically to label *all* chemicals as carcinogens unless they could prove the chemical was not

a carcinogen. This is not the case. In enacting Proposition 65, the voters demanded to be informed when a business exposed them to chemicals *identified as carcinogens* by the International Agency for Research on Cancer ("IARC"), the World Health Organization's cancer research arm and an eminent international scientific entity. There is no dispute that IARC has made this identification for glyphosate.[3] When a business exposes its customers to a chemical that has been identified as a carcinogen, the State can reasonably require the business to inform the exposed individuals. The fact that the business is then given an opportunity to avoid the warning requirement by showing that the specific exposure causes no more than one excess cancer per 100,000 exposed individuals does not unconstitutionally burden its free speech rights.[4]

Second, the Chambers ignore the fact that many laws compelling speech, including those in the cases they cite, place an *absolute* burden on businesses to provide warnings, with *fixed* warning language and delivery methods. *See, e.g.*, *American Beverage Ass'n v. City and County of San Francisco*, 871 F.3d 884, 888 (9th Cir. 2017) ("*American Beverage*") and *CTIA-The Wireless Ass'n v. City of Berkeley, California*, 854 F.3d 1105, 1111 (9th Cir. 2017) ("*CTIA-Wireless*"); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 107, 115 (2nd Cir. 2001); Opposition at 15. Unlike these laws, Proposition 65 mitigates any burden imposed by the warning

[3] In this case, the IARC Working Group, which consisted of sixteen scientists from three U.S. agencies, two U.S. schools of veterinary medicine, and eight other countries, determined *by consensus* that glyphosate causes cancer in animals, based on studies showing an increased incidence of malignant tumors as well as an increased incidence of benign and malignant tumors (combined) in animals. Zuckerman Decl., Exh. N, IARC *List of Participants*, Monograph 112 at 3-5, and Zuckerman Decl., Exh. O, IARC *Glyphosate*, from Monograph 112, at 76,78-79. It is therefore, proper to say that glyphosate is "known to cause cancer." *AFL-CIO v. Deukmejian*, 212 Cal. App. 3d 425, 436-37 (Cal. Ct. App. 1989). Since IARC also determined that the mechanism of tumor formation (mechanistic data) was relevant to humans, Zuckerman Decl., Exh. O, IARC *Glyphosate,* from Monograph 112, at 78, this statement is consistent with federal law as well. *See* 29 C.F.R. § 1910.1200, Appendix A.6.1; *see also* Opposition at 4-5.

[4] The Chambers' supporting argument reveals the flaw in their logic. Specifically, they pose the analogy of a regulation requiring all large farms to warn that their products are "NOT CRUELTY FREE" unless they can prove that their livestock is well-treated. The Chambers claim that such a regulation would improperly burden the farm's commercial speech rights. Chambers Brief at 13, n.4. This analogy does not, however, match the facts here. A more correct analogy would be if a respected international agency of farming experts that had been relied on for decades by California, other States, and the United States had made a finding that the specific practices used by the large farms were cruel, and, based on that finding, those farms were required to inform consumers that their products are "NOT CRUELTY FREE," unless they could prove otherwise.

requirement by (1) permitting businesses to avoid warning altogether if they demonstrate that the exposure does not cause a significant risk of cancer; (2) allowing warnings that are tailored to the specific exposure; and (3) providing a variety of methods for conveying the warning. Since the Proposition 65 warning requirement is not absolute and the warning language is not fixed, it is significantly less burdensome than the warning laws on which the Chambers rely.

IV. PROPOSITION 65 PROPERLY REQUIRES BUSINESSES TO PROVIDE WARNINGS REGARDING THE CHEMICALS IN THEIR PRODUCTS THAT EXPOSE CALIFORNIANS TO CARCINOGENS.

The Chambers also suggest that the State of California should not burden their members with a warning requirement at all, but should instead "employ its own powerful megaphone," presumably to communicate the risks of glyphosate. Chambers' Brief at 8. That argument was rejected in *Sorrell,* where the court held that there was no First Amendment violation when the State required businesses to use prescribed labeling to disclose that a hazardous substance was present in their products. *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, *supra,* 272 F.3d at 113-116. It is, moreover, important to note that California's "megaphone" would be of no use in informing consumers, gardeners and farmworkers which products will, and will not, expose them to significant amounts of glyphosate. As noted in the Opposition, there is surprisingly little information available regarding the levels of glyphosate in consumer products, and neither Plaintiffs nor the Chambers have provided the Court with any test results or other relevant facts. *See* Opposition at 21-23, 39. Since businesses are in the best position to know which chemicals are in their products and what exposures they are likely to cause, it is reasonable to require them to inform their customers before exposing them to those chemicals, rather than shifting the burden to the State.

V. PROPOSITION 65 WARNINGS WILL MEET THE TEST THE COURT APPLIED IN *AMERICAN BEVERAGE*.

Citing *American Beverage*, the Chambers argue that Defendants cannot meet their burden of "demonstrating that [the] disclosure requirement is purely factual and uncontroversial." Chambers' Brief at 12 (quoting *American Beverage*, 871 F.3d at 895). This issue is not ripe,

since the Court does not have before it any specific Proposition 65 warning to test against the applicable First Amendment standard. Further, the discussion in *American Beverage* demonstrates why a Proposition 65 warning will pass First Amendment muster, while the soda warning at issue there did not.

Unlike the warning imposed by the ordinance in *American Beverage*, the Proposition 65 warning language is not set in stone, and can be written to ensure that it is purely factual, both in general and as applied to specific uses of products. In *American Beverage*, the court found that the specific, unchangeable warning that San Francisco required for beverages was objectionable, but that it would have passed muster if the required warning were changed to state, "*overconsumption* of sugar-sweetened beverages contributes to obesity, diabetes, and tooth decay, or that consumption of sugar-sweetened beverages *may* contribute to obesity, diabetes, and tooth decay." *American Beverage*, 871 F.3d at 895 (emphasis in original). Proposition 65 allows just such changes if warranted by the facts. It therefore allows the flexibility that *American Beverage* demands, and it satisfies the First Amendment.

VI. THE CHAMBERS' BROAD CRITICISMS OF PROPOSITION 65 ARE IRRELEVANT.

Finally, the Chambers mount a largely irrelevant broadside attack on Proposition 65, quoting extensively from a dissenting opinion in a single case. None of the Chambers' screed, however, is relevant to the issues here, namely, whether this case is ripe, and whether the warning requirement comports with the law applicable to commercial speech.

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CONCLUSION

For the reasons set forth above, the Chambers' Brief provides no support for Plaintiffs' Motion, and Defendants respectfully request that the Court deny that motion.

Dated: January 26, 2018

Respectfully submitted,

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